



Yale Journal of Law & the Humanities

Volume 2

Issue 1 *Yale Journal of Law & the Humanities*

Article 6

January 1990

Swearing Attachment: Oath Bran; or, Law, Politics, and Allegiance

Lief H. Carter

Follow this and additional works at: <https://digitalcommons.law.yale.edu/yjlh>



Part of the [History Commons](#), and the [Law Commons](#)

Recommended Citation

Lief H. Carter, *Swearing Attachment: Oath Bran; or, Law, Politics, and Allegiance*, 2 YALE J.L. & HUMAN. (1990).

Available at: <https://digitalcommons.law.yale.edu/yjlh/vol2/iss1/6>

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Journal of Law & the Humanities by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

Swearing Attachment

Oath Bran; or, Law, Politics, and Allegiance

Lief H. Carter

PREFACE

This essay extends the remarks I made at the symposium, “Language, Law, and Compulsion,” but it tries to retain the style and spirit of my oral delivery. Indeed I must retain that spirit if I am to practice what I preach. This essay suggests that the rhetoric of formal academic discourse and our experience of formal academic argument differ vastly from the rhetorics and experiences which sustain everyday political communities. We distort political processes and experiences badly simply by converting them into academic rhetoric at all. For example, the processes that create and sustain communities presumably do not depend on thorough footnoting. The letter killeth, and so on. The very act of thinking and writing in formal academic fashion about law, politics, and the humanities can blind us to the poetic, musical, spiritual, and other mysterious aspects of human bonding. I mean here to preserve some appreciation for the emotional and nonrational qualities of political life that have traditionally concerned the humanities precisely because they are central to our experience of community itself. Hence I write without footnotes. Readers who prefer a more conventionally academic treatment of these issues might consult the last two decades of mainstream writings in ethnomusicology, beginning with John Blacking’s *How Musical Is Man?*, 1973.

I

The organizers of the Symposium asked us—Sunstein, Levinson, Boswell, and myself—to wrestle with the following questions: How do oaths of allegiance and other speech ceremonies serve to create and foster attachments between self and other? How do we constitute communities through words which bind? The oath of loyalty to a company of strangers and the marriage vow to an intimate friend differ on almost every psychological dimension imaginable. Nevertheless, my nutshell answer to both these questions as they apply to nationality and marriage is the same: Speech ceremonies and words that bind are, in the grand scheme of things, not very central to the constitution of intimate attachments or of communities.

Professor Owen Fiss unknowingly provided material that helps direct my argument when, on page 42 of its September 29, 1986, issue, the editors of *The New Republic* published Fiss's letter critical of Edward Rothstein's essay on the late pianist Glenn Gould:

Edward Rothstein is looking for something, but not in the right places ("Making-Believe Crazy," August 25). I suggest that he attend a Stevie Wonder concert, which I was fortunate enough to do the other night (thanks to my daughter). Stevie Wonder did not reinforce aristocratic values, but somehow managed to transform the audience into a community that cut across class, age, sexual, and racial lines, and to give to that community a life and a beat. The music that we heard was available on tape, but the performance was not. We were reminded that Stevie Wonder is blind and black, and one of the musical geniuses of our age; he is male, but wore his hair and clothing in a way that universalized his appearance; he was encased in electronic gadgetry, but spoke only of love; and he used his hold over the audience to address the highest issues of state and to denounce apartheid. Stevie Wonder is the "communal myth" that Rothstein seeks, but it is the myth of a democracy.

I find two competing models of community-making implicit in this letter. The first model posits that community depends on some common allegiance to or acceptance of an idea, in this case the idea of an inclusive democracy. Stevie Wonder addressed the highest matters of state, both in his words—his denunciation of apartheid—and in his body language. His performance persuaded us that we can live out a vision of social equality and dignity. In the second model, community depends on the experience of a powerful coherence in a moment. In this model, it is not the vision of democratic theory that makes the community (except, perhaps, for a few abnormally educated people like readers of this journal). Rather, the community *is* the experience of shared sounds and symbols that have truth value within the culture. If, as I believe, this second model better approximates the politics of community-making, then ceremonies and words can

bind only if they repeat the experience of sharing truthful sounds and symbols. Taking an oath of naturalization or of marital fidelity thus cannot carry the same political load as do, say, the ritual songs and dances that John Blacking's *How Musical Is Man?* describes.

But let me back away from this rather dogmatic and perhaps simplistic opening. My real mission here is to provoke conversations that help us attach to each other. I hope to distinguish more promising from less promising paths, and I mean to begin by suggesting that the conventional wisdom about oaths leads to dead ends and symptomatizes a serious flaw in the habits of contemporary academic discourse, at least in my field of the social sciences. By conventional wisdom I mean, for example, the assumption that if X takes an oath, X's behavior is more likely to comply with the behavior the oath commands, all other things being equal, than if X did not take the oath. Therefore, the greater the proportion of community members who take a common oath, the more uniformly community members will believe certain values and behave accordingly. I reject such a formulation, with its intentional parody of contemporary social scientific language. I also mean to reject a somewhat more plausible formulation, namely that the experience of sharing the promise, of taking the oath in a ceremony shared by strangers, increases one's commitment to live either by the oath's words or by other rules and decisions the community imposes.

I'm not going to belabor the obvious methodological difficulties in testing such conventional social science assumptions about attachment ceremonies except to note that all other things are never equal and that when interpretive disagreements about an oath's meaning arise, we lose our measure of compliance. Indeed, scholars won't agree on how to interpret interpretive disagreements. Suppose the disagreement on the following two interpretive questions: Does the emotional death of a marriage count as "till death do us part"? Just what *are* the limits of George Bush's ability? Would the existence of such disagreements indicate that the oath in each of these cases has failed by failing to constitute a common language effectively? What of the converse? Since language is inevitably imprecise, would our very willingness to invest in resolving a textual disagreement mean that we are already attached and well-constituted?

Pulling one step back from the folly of positivistic social measurement, we might take either of two more theoretical paths, either a *homo economicus* rational-man or a Freudian (or William Barrett) irrational-man path. Both are appealing. Maybe we live our lives as a more or less continuous series of cost-benefit calculations. The impact of the one-time taking of an oath is inevitably trivial. What matters is the extent to which the expectations the oath creates make violation more costly than compliance—and this in turn is a function not of taking the oath but of living in a community, a church, a marriage, a polity, that values the substance of

the oath, a value which we learn not by taking the oath but by seeing violations consistently punished. Even if school children repeat it nearly as often as they brush their teeth, the Pledge of Allegiance would not bind unless children consistently experience the benefits and costs of taking it seriously. Conversely, on the Freudian path, we are driven by our feelings. Oaths as formal commands, or simply as messages, lack the psychic strength to overcome the powers of anger, love, hunger, friendship, and so forth.

I don't intend to pursue either rational or irrational man models. In fact, I can't distinguish them in my own experience. The following story seems to me to confirm that the two inevitably blend. My oldest child was married last New Year's Eve. Friends and relatives from around the country gathered in Athens, and my wife and I got pretty frantic arranging meals, flowers, music, hotel reservations, and the like. At one point my wife declared, with a hint of hysteria in her voice, that she would pay the kids to elope if it weren't for the fact that all the effort and all the ceremony would make them realize the seriousness of the oaths they were about to take. Her brother, a social psychologist, said no, the reasons for the ceremony were completely different. Studies show, he said, that the slopes of the approach curve and the avoidance curve, in standard approach/avoidance psychology, differ. The approach curve starts sooner but rises at a lower slope. The avoidance curve rises faster but starts later, so that its height surpasses the approach curve just shortly before the stressful event. Ceremonies like weddings are designed to raise temporarily the costs of avoidance, to raise the costs of backing out because otherwise people would back out far too often.

So, wedding ceremonies are a cleverly rational social response to a problem created by our individual irrationality. The ceremony does not make words more meaningful and binding. The ceremony is part of a larger, and often coercive, cost-benefit package that society imposes because we are, individually, often so incapable of action that is rational beyond the moment.

II

But recall that so far I've tried only to describe some paths I advise against taking. My main argument for rejecting these paths goes like this: Communities and attachments are not constituted in a "one-shot" sense at all. They are acts of continuous creation, not big bangs. Taking an oath once is no more helpful than taking oat bran once to reduce cholesterol levels. Yet the very questions I started with, questions which this panel was asked to address—How do speech ceremonies serve to create and foster attachments? How do we constitute through words which bind?—imply that a "shot" of text, of oath or constitution, can make a

community. These questions can only arise from an understanding of law, language, and human nature that I believe is wrong. Robert Penn Warren hinted at the error on pages 54-55 of his *Democracy and Poetry* (1975):

[A]s Thomas Jefferson, in a letter to his daughter Martha, remarked, Americans felt that any difficulty could be surmounted by “resolution” and “contrivance”—and this remained as true of the last man off the boat at Ellis Island as of the first settler at Jamestown. But the success that rewarded our resolution and contrivance led us, bit by bit, to believe that solutions would be almost automatic: pass a law, take a poll, draw up a budget, make a body count, hire an expert or PR man, believe only optimistic reports.

Is there not some functionalistic premise quite deep, both in conventional liberal philosophy and in our political and legal culture, which says in effect that oaths matter, that the Constitution matters, that marriage vows matter only because such contrivances solve problems?

My argument thus far threatens academic conventions. If we constitute communities less through analytical judgments than through poetically experiential processes, academic analysis may inevitably distort political reality beyond recognition. To ward off that conclusion I want to suggest three not entirely compatible alternative paths that may connect oaths and attachment ceremonies, though not very powerfully, to this process of continuous constitution of communities.

In the first of these, public language of all sorts—legal, religious, political, commercial, and so on—does not create community by declaring the norms and values we agree to live by nor does such language impose an artificial but necessary common understanding of life’s inherent chaos. It matters because its familiar and predictable repetitions are themselves the individual’s experience of community. We don’t consciously confirm attachments as much as we experience being attached. How we experience that is a mystery which academics will not successfully explain. It is in this view the very mysteriousness of the covenantal experience, as opposed to the contractual one, that binds. Repeating the Mass in Latin did continuously constitute communities that spoke no Latin. Martin Buber made the same point when he down-played the difference between natural and supernatural explanations of the events in the Exodus:

It is irrelevant whether “much” or “little,” unusual things or usual, tremendous or trifling events happened; what is vital is only that what happened was *experienced* . . . as the act of God. The people saw in whatever it was they saw “the great hand,” and they “believed in Yahweh”. . . . From the biblical viewpoint history always contains the element of wonder. (*Moses*, 1946, pp. 77, 79.)

The second alternative draws from the new pragmatism of Richard

Rorty and its legal analog in the law and literature work of James Boyd White. In this thoroughly discursive model of politics, a legal provision, an oath, or a vow can be no more than a conversational stimulant. Just as conversations about oat bran tell us less about the inherent properties of oat bran than about the value of individualism and the degree of self-consciousness in our polity, so political and legal conversations matter for reasons quite apart from the conclusions the arguments claim to reach. Communities are constituted by communal talk, and if (for whatever reasons) we take oaths seriously, our efforts to talk to one another about them will constitute us. Experience and conversation constitute us. Our talk about common experiences, about marriages, about Meryl Streep's or Dustin Hoffman's latest film, or the Super Bowl, or why the last presidential campaign was so disturbing, bind marriages and politics more tightly than do presidential, marital, or naturalization oaths. On this view, the presidential oath of office, for example, helps to constitute us only in circumstances like Watergate, when it helps us sharpen the debate over an issue like Richard Nixon's impeachment.

This second alternative for understanding the constituting power of words that bind assumes that we are moving from a liberal contractarian paradigm to a discursive paradigm. The third alternative moves from the liberal paradigm toward what I can only call a hopefulness paradigm. Public language of all sorts seeks to maintain the meaningfulness of associating with a group by reconfirming the trustworthiness and virtue of the individuals in it, and especially the virtue of group leaders. L. H. LaRue in his superb book on Watergate (*Political Discourse*, 1988) has stated that the most fundamental political question we can ask of one another is "Do you really mean what you have said?" The oath is a way of saying, "Yes, I really mean it," but the desirable consequence is not that one then must comply in the future but that trust is created in the moment. But if this is the key to creating trust and the common experience of virtue, then oaths have no special or unique political importance or power to make communities. At least this seems to have been former Senator John Tower's theory of politics when he defended his nomination to be George Bush's Secretary of Defense in 1989. On Sunday, February 26, he stated that he had never broken an oath or pledge. On March 1 before the National Press Club he asserted that he had broken marriage vows and that he suspected he was not alone. Tower seemed to strive for creating believability in the moment, and apparently neglected the capacity of videotape to run both comments side by side in a future moment.

The static, contractual character of oaths may further diminish their significance if we posit that maintaining enthusiasm for and trust in a spouse or a political leader or a community depends on creativity, on the hope that continued association will create something new. What if the continuously creative character of relationships is obvious to nearly all but

academicians who make a living attacking or defending liberalism? Perhaps virtue, courage, discipline and hence attachment are reconfirmed most directly by grappling with the possibility of changing the existing order in more hopeful directions. I suspect it is this hopefulness, not the commitment to specific biblical commands, which sustains the evangelical community. Perhaps the constitutional bicentennial should therefore have celebrated what Will Harris called the “sovereign power to make things over,” a point which seems largely to have escaped the bicentennial commission.

We have at our disposal a few experiential tests of such a model. We might ask why we particularly admire a Justice, like the second Harlan, or a scholar, perhaps Ronald Dworkin, without agreeing with them. If we do, it may be because the coherence of their creative performances enhances our commitment to an enterprise we share with them. I believe they really mean what they say. And they seek to create something new. I speak here of what Michael Moore has called a coherence standard and which I in the past have called an aesthetic standard. If we test virtue and integrity through the experience that our actions and beliefs cohere over time, then the most an oath can do is help limit and frame what needs to cohere.

Conversely, the sorry state of debate in the 1988 presidential election campaign seems, at least to me, to be almost purely a function of my inability to believe that either candidate really meant anything. Bush’s election victory seems best understood not in terms of policy preferences but in the lesser incoherence in the messages, verbal and non-verbal, that he sent. Neither the fact nor the ceremony of his taking the inaugural oath changes my expectations for his presidency, any more than my son’s and daughter-in-law’s oath-taking in their marriage service changes my expectations for their future.

III

How, finally, might my remarks apply to this occasion? Most obviously, whether this conference will further strengthen a community of scholars will not depend on whether we take an oath or whether we agree with one another but on whether we trust each other to mean what we say. Somewhat less obviously, I hope my remarks have at least hinted at the importance of a first-class journal connecting law and the humanities, for the humanities have never taken liberalism’s model of political or interpersonal attachment very seriously. If we need models that we can more deeply trust, I have no doubt they will come from an increasing appreciation of the mythopoetic quality of life, one in which, as Wagner’s “Die Meistersinger von Nürnberg” so charmingly shows, tradition and change depend equally on demonstrations of public virtue that we achieve

only through what we commonly call “art.” Attachment ceremonies are, of course, art forms, but I’m reluctant to destroy the mystery of art by explaining it. The best we can do is strive to repeat the wonder we experience in connecting. Indeed, Harold Berman’s description, in *Law and Revolution*, of law in the late middle ages in Germany may come close to the mark: “Law was conceived primarily as an expression of the unconscious mind of the people . . . , rather than primarily as a deliberate expression of conscious reason or will. It was, in that respect, like art, like myth, like language itself” (p. 68). The greatest good this new journal can do is to help teach us to keep alive our appreciation for our aesthetic wonder at the core of community life.